No. 174

In the Supreme Court of the United States

OCTOBER TERM, 1958

UNITED STATES OF AMERICA, PETITIONER

v.

EMBASSY RESTAURANT, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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CITATIONS

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the District Court (R. 41a–44a) is reported at 154 F. Supp. 141. The opinion of the Court of Appeals (Appendix, *infra*, pp. 9–15) is reported at 254 F. 2d 475.

JURISDICTION

The judgment of the Court of Appeals was entered on April 16, 1958. (Appendix, *infra*, pp. 15–16.) The jurisdiction of this Court is conferred by 28 U. S. C. 1254 (1) and 11 U. S. C. 47.

QUESTION PRESENTED

Whether contributions required to be made by an employer to a union welfare fund, pursuant to the

terms of a collective bargaining agreement, are entitled, in bankruptcy, to priority over federal taxes owed by the employer, on the theory that the contributions constitute "wages * * * due to workmen" within the meaning of Section 64a (2) of the Bankruptcy Act, as amended.

STATUTE INVOLVED

Bankruptcy Act, c. 541, 30 Stat. 544 (11 U. S. C. 104):

> SEC. 64 [As amended by Sec. 1, Act of June 22, 1938, c. 575, 52 Stat. 840]. *Debts Which Have Priority.*—a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be * * * (2) wages, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; * * * (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof * * *.
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> * * * * *

STATEMENT

On May 21, 1951, Embassy Restaurant, Inc., the bankrupt employer, entered into a collective bargaining agreement with the Local Joint Executive Board of Philadelphia (referred to in the contract and herein as the "Union"), consisting, *inter alia,* of Local Unions Nos. 111 and 301. In that agreement,

the employer recognized the Union as the sole and exclusive bargaining representative of its employees. (R. 41a.)

On September 1, 1951, the bargaining agreement was amended to render ineffective the sick leave benefits as to certain types of employees. In this supplemental agreement, the employer agreed to pay a certain monthly sum into the Union Welfare Fund for each member of the Union in its employ. (R. 5a–8a.)

The agreement contained provisions relating to hours, wages, vacations, holidays, seniority and other conditions of employment. Another provision related to sick leave with pay for seven days each year (which could be accumulated, if not used, to a maximum of twenty-one days). (R. 41a.)

Subsequently, on July 1, 1956, another collective bargaining agreement was executed between the Greater Philadelphia Restaurant Operators, Inc., acting on behalf of Embassy Restaurant, Inc., and other restaurants, and the Union, which provided for contributions to the Welfare Trust Funds of Local Unions 111 and 301. Specifically, it provided that each employer was required to pay the sum of $8 per month for each employee in the collective bargaining unit represented by the Union. This was the agreement in effect on the date the employer was adjudged a bankrupt. (R. 15a, 41a–42a.)

The Welfare Plans were administered pursuant to a formal agreement and declaration of trust. Each trust provided that the term "employee" meant any employee in the collective bargaining unit represented

by the Union, and that the purpose of the Welfare Plan was to provide welfare benefits for eligible employees. The trustee of the Welfare Fund had the right, in his discretion, to file claims in any proceeding in which an insolvent employer was involved, and was obligated to endeavor to have such claims considered and declared to be entitled to priority of payment. Questions pertaining to the validity of the Trust, its construction and administration, were to be determined in accordance with the laws of the Commonwealth of Pennsylvania. (R. 42a.)

Subsequent to the employer's being adjudged a bankrupt, the trustees of the Welfare Funds of Local Unions 111 and 301 filed proofs of claim. In so doing, they asserted status as priority wage claimants, pursuant to the provisions of Section 64a (2) of the Bankruptcy Act, c. 541, 30 Stat. 544, as amended, for payments to the Welfare Funds of the amounts of $216 and $336, respectively, which had accrued in the three-month period prior to the bankruptcy. The Referee denied the claim of priority but allowed the trustees the status of general unsecured creditors. On review, the District Court vacated the order of the Referee and held that the claims of the trustees were priority claims for wages within the meaning of Section 64a of the Bankruptcy Act (R. 42a–45a), thereby giving them preference over the lien claim (R. 31a–33a) which had been filed by the Government for unpaid taxes. The Court of Appeals affirmed. (R. 41a–45a; Appendix, *infra*, pp. 9–16.)

REASONS FOR GRANTING THE WRIT

1. The decision below is in direct conflict with the recent decision of the Court of Appeals for the Second Circuit in *Local 140 Security Fund* v. *Hack*, 242 F. 2d 375, certiorari denied, 355 U. S. 833, with which the Third Circuit (*infra*, p. 13) felt "constrained to disagree". The *Hack* case, *supra*, involved payments, computed upon the basis of the gross payroll of the employees in a bargaining unit, to be made by the employer to a union security fund which had welfare purposes. It was there held (242 F. 2d at 378) that the provisions of the collective bargaining agreement for such payments "created only a debtor and creditor obligation between the employer and third parties, for something other than wages" and that "[t]he language of the statute granting priority to wages cannot be stretched so as to embrace this type of claim." In the Second Circuit's view (*id.*, pp. 377–378), the claim, in order to be entitled to priority under Section 64a (2), must be one for wages originally due to a workman; if the claim was never a part of a workman's wages and was never a sum due to him, it cannot be deemed to fall within the terms of the statute.[1]

Arriving at an opposite result in the instant case, the Third Circuit stated (*infra*, pp. 12–13) that it was

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[1] To similar effect, see the following decisions of the District Courts. *In re Brassel*, 135 F. Supp. 827 (N. D. N. Y.); *In the matter of Sleep Products Inc., Bankrupt*, 141 F. Supp. 463 (S. D. N. Y.); *In re Victory Apparel Manufacturing Corp.*, 154 F. Supp. 819 (D. N. J.). *Contra: In re Otto*, 146 F. Supp. 786 (S. D. Calif.).

"firmly convinced that unions bargain for these contributions as though they were wages, and further that industry considers the contributions as an integral part of the wage package." It concluded (*ibid.*) that the "contributions are in a true sense the agreed compensation for services rendered and as such must be considered wages."

In so holding, the Third Circuit was persuaded, in part, by the decision of this Court in *United States* v. *Carter,* 353 U. S. 210. There, in a suit brought by the trustees of a welfare fund, a surety under a Miller Act bond was held liable on its payment bond for a Government contractor's default on his agreed obligation to contribute the sum of 7½ cents per man-hour to the construction workers' health and welfare fund. The relevant provision of the Miller Act (Section 2 (a) of the Act of August 24, 1935, c. 642, 49 Stat. 793) states that "Every person who has furnished labor * * * and who has not been paid in full therefor * * * shall have the right to sue on such payment bond * * * for the sum or sums justly due him * * *". Pointing out that the parties had stipulated that contributions to the fund were part of the consideration the contractor agreed to pay for the services of laborers on the construction job, and that the relation of the contributions to the work done was reflected in the fact that the contributions were measured by the exact number of hours each employee performed services for the contractor, this Court held (353 U. S. at 220):

> For purposes of the Miller Act, these contributions are in substance as much "justly

due" to the employees who have earned them as are the wages payable directly to them in cash.

As appears from the quoted language, this Court treated the contributions as something other than wages. Indeed, it was required to do so, for the agreement involved expressly stated (*id.*, p. 214) that the contributions "shall not constitute or be deemed to be wages" due the employees. The Court emphasized (*id.*, pp. 217–219) that the Miller Act does not limit recovery on the statutory bond to "wages", but rather provides that every person who has furnished labor and material in the prosecution of the work provided for in the contract shall be "paid in full" and receive all "sums justly due." The *Carter* case, therefore, does not support the decision below.

2. The question presented is an important one from the standpoint of the collection of the federal revenue and the administration of the Bankruptcy Act.[2] During the fiscal years ended June 30, 1955, 1956, and 1957, there were, respectively, 6,320, 7,035 and 7,668 asset cases concluded by the bankruptcy courts under the provisions of Chapters I–VII of the Bankruptcy Act.[3] Most such cases involve both wage and tax claims. And certainly, in the light of the increasing prevalence of union welfare funds, there

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[2] Cf. *Goggin* v. *California Labor Div.*, 336 U. S. 118, 124.

[3] Annual Report of the Director of the Administrative Office of the United States Courts: 1955, p. 234; 1956, p. 282; 1957, p. 246.

can be no doubt that the precise issue here presented will be a constantly recurring one.[4]

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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CHARLES K. RICE,
Assistant Attorney General.
MELVA M. GRANEY,
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Attorneys.

JULY 1958.

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[4] At present, we know of four cases within the Third Circuit which will be governed by the instant decision.

APPENDIX

United States Court of Appeals for the Third Circuit

No. 12,323

IN THE MATTER OF EMBASSY RESTAURANT, INC., BANKRUPT

UNITED STATES OF AMERICA, APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued January 8, 1958

Before MARIS, MCLAUGHLIN and STALEY, *Circuit Judges*

Opinion of the Court

(Filed April 16, 1958)

By STALEY, *Circuit Judge.*

The achievement of complete economic security for industrial workers is the ultimate aspiration of the American labor movement. One method of attaining a measure of this security is the union welfare fund maintained to provide employees with life insurance, hospital and surgical benefits, sick pay, and other advantages. Under virtually all arrangements for a welfare fund, the collective bargaining agreement obligates the employer to contribute a certain sum of money periodically to the fund. Whether these employer contributions are entitled to preference under Section 64 (a) (2) of the Bankrupt Act as "wage

* * * due to workmen" is the inquiry presented on this appeal.

The facts are not disputed. A collective bargaining agreement was entered into by the employer and the union on March 21, 1951. After recognizing the union as the exclusive bargaining agent, the agreement dealt with the accustomed provisions relating to discharge, layoff, seniority, vacations, hours, wages, holidays, and other employment conditions. It contained also provisions for sick leave with pay.

On September 1, 1951, the bargaining agreement was amended to render ineffective the sick leave benefits as to certain types of employees. In this supplemental agreement, the employer agreed to pay a certain monthly sum into the union welfare fund for each member of the union in its employ.

On July 1, 1956, another collective bargaining agreement was executed providing that the employer pay into the welfare fund monthly the sum of $8.00 for each of its employees who are union members. This was the agreement in effect on the date the employer was adjudged a bankrupt.

A written Agreement and Declaration of Trust, dated December 13, 1951, outlined the administration of the union welfare fund.[1] It provided generally for employee welfare benefits and authorized the trustees to file claims for priority of payment of the employer's contribution to the fund in any proceeding involving an insolvent employer. Finally, it specified the application of Pennsylvania law to any questions involving the trust's validity or administration.

The trustees of the welfare fund filed proofs of claim in the employer's bankruptcy proceeding, seek-

[1] There are two trust funds involved in this case, but because the facts of each are the same, we treat them as one.

ing priority as wage claimants for the unpaid employer contributions to the fund which had accrued in the three months prior to bankruptcy. In the same proceeding, the United States filed a lien claim for unpaid taxes. The referee denied the unpaid employer contributions to the welfare fund the status of wages within Section 64 (a) (2), and relegated the amounts to the status of payments due unsecured creditors. The district court vacated the referee's order and granted wage priority to the employer contributions. 154 F. Supp. 141 (E. D. Pa. 1957). The appeal of the United States followed.

The Chandler Act provides in Section 64 (a), 11 U. S. C. § 104 (a), for debts which have priority over general unsecured claims, and designates the order of payment, so far as is relevant here, as follows:

> * * * (2) wages not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt * * * (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof * * *.

It is undisputed that the amounts of unpaid employer contributions do not exceed $600 to each claimant and that the sums were earned within three months of bankruptcy. The narrow issue remaining for determination by this court is whether the employer's payments to a union welfare fund pursuant to a collective bargaining agreement are "wages * * * due to workmen" within the purview of Section 64 (a) (2).

The resolution of this precise issue has met with a diversity of judicial opinion in the federal courts.

The Second Circuit has dealt with the problem in *Local 140 Security Fund* v. *Hack,* 242 F. 2d 375, cert. denied, 355 U. S. 833 (1957), where the employer contributions to the fund there involved were denied the status of wage claims. The court decided that if the term "wages" was to be enlarged beyond its normal definition, this was a legislative and not judicial function. The concurring opinion observes that the fund was not a "workman" within the meaning of Section 64 (a) (2). A district court in California arrived at an opposite decision in the case of *In re Otto,* 146 F. Supp. 786 (S. D. Cal. 1956). There it was held that employer contributions to a welfare fund represented merely another method of computing wages and should therefore be given the wage priority provided for in Section 64 (a) (2).

In our own circuit, two district courts have taken opposite stands. The district court in the present case followed the rationale and conclusions of the *Otto* case, while the district court for the District of New Jersey chose to follow the rule of the Second Circuit in the *Hack* case. *In re Victory Apparel Mfg. Corp.,* 154 F. Supp. 819 (1957).

Union Funds providing welfare benefits to employees through employer contributions contracted for in collective bargaining agreements play an essential and ever growing part in our industrial economy. We are firmly convinced that unions bargain for these contributions as though they were wages, and further that industry considers the contributions as an integral part of the wage package. See *Note,* 66 Yale L. J. 449, 460 (1957). The contributions are in a true sense the agreed compensation for services rendered

and as such must be considered wages.[2] For this reason we are constrained to disagree with the view of the Second Circuit in the Hack decision and to affirm the decision of the district court here.

Since the opinion in the *Hack* case was rendered, the Supreme Court has expressed its view of the relalationships created by the union welfare funds and the character of the employer contributions to such funds. In *United States* v. *Carter,* 353 U. S. 210 (1957), the trustees of a welfare fund sued the employer and his surety to recover unpaid contributions, the action being brought pursuant to the Miller Act, 40 U. S. C. §§ 270a and 270b. That statute requires that a payment bond be furnished by a contractor working on the construction of federal public buildings, and provides that "Every person who has furnished labor * * * and who has not been paid in full therefor * * *

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[2] The National Labor Relations Act makes it an unfair labor practice for an employer to refuse to bargain collectively with respect to "rates of pay, *wages*, hours of employment, or other conditions of employment." 29 U. S. C. §§ 158 (a) (5) and 159 (a). It has been held that since the benefits of pension and insurance plans are within the scope of the term "wages" the plans are proper subjects of collective bargaining. In the case of *Inland Steel Co.* v. *N. L. R. B.*, 170 F. 2d 247, 251 (C. A. 7, 1948), cert. denied, 336 U. S. 960 (1949), the court quoted from the Board's opinion with approval:

" 'With due regard for the aims and purposes of the Act and the evils which it sought to correct, we are convinced and find that the term "wages" as used in Section 9 (a) must be construed to include emoluments of value, like pension and insurance benefits, which may accrue to employees out of their employment relationship. * * * Realistically viewed, this type of wage enhancement or increase, no less than any other, becomes an integral part of the entire wage structure, and the character of the employee representative's interest in it, and the terms of its grant, is no different than in any other case where a change in the wage structure is effected.' "

See also *N. L. R. B.* v. *Black-Clawson Co.*, 210 F. 2d 523 (C. A. 6, 1954); *W. W. Cross & Co.* v. *N. L. R. B.*, 174 F. 2d 875 (C. A. 1, 1949).

shall have the right to sue on such payment bond * * * for the sum or sums justly due him * * *." 40 U. S. C. § 270b (a). The Supreme Court there was confronted with the issues of whether the trustees of the fund could sue as a "person who has furnished labor" and whether the unpaid employer contributions were "sums justly due him." The Court permitted the action and its unanimous opinion bears persuasively on the case here for decision.

The bargaining agreement in the *Carter* case was similar to the agreement in this case, except that the employer was to pay into the welfare fund 7½ cents for each employee hour worked. The government suggests that when the welfare fund contributions in bargaining agreements are measured by a percentage of the wage earned there exists a basis for distinguishing such an arrangement from the situation where the employer pays a flat monthly sum for every employee. This seems to urge a distinction analogous to the difference between a wage and a salary; Section 64 (a) (2) does not make that distinction, and neither do we. The Supreme Court in the *Carter* case found it unnecessary to decide whether employer contributions to the welfare fund were technically wages assigned by the employees. It did decide that the trustees could sue on behalf of the employees to protect the employees' rights. The Court then made the following particularly relevant observation, 335 U. S. at page 220:

> * * * the trustees of the fund have an even better right to sue on the bond than does the usual assignee since they are not seeking to recover on their own account. The trustees are claiming recovery for the sole benefit of the beneficiaries of the fund, and those beneficiaries are the very ones who have performed the labor. The contributions are the means by which the

fund is maintained for the benefit of the employees and of other construction workers. For purposes of the Miller Act, *these contributions are in substance as much "justly due" to the employees who have earned them as are the wages payable directly to them in cash.* [Emphasis supplied.]

Like Section 64 (a) (2) of the Chandler Act, the Miller Act sought to protect employees by guaranteeing to them the wages they have earned. We see no reason to treat employer contributions in one way under the Miller Act and in another under the Chandler Act.

The decision of the district court will be affirmed.

United States Court of Appeals for the Third Circuit

No. 12323

IN THE MATTER OF EMBASSY RESTAURANT, INC., BANKRUPT

UNITED STATES OF AMERICA, APPELLANT

PHILADELPHIA JOINT BOARD, AMALGAMATED CLOTHING WORKERS OF AMERICA, INTERVENOR

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: MARIS, MCLAUGHLIN and STALEY, *Circuit Judges*

Judgment

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of July 9, 1957, of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF, *Clerk.*

APRIL 16, 1958.

Received and filed Apr. 16, 1958. Ida O. Creskoff, Clerk.

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